SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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R.S.N. CONSTRUCTION CO., INC.,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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INDEX NO. 656686/2017

MOTION DATE 12/03/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75 were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion of defendant New York City Housing Authority to dismiss the complaint is granted, in accord with the following memorandum decision.

Background

Plaintiff R.S.N. Construction Co., Inc. ("Plaintiff"), is a New York corporation with its principal place of business in Roslyn Heights, New York (complaint ¶ 1).[1] Defendant New York City Housing Authority ("Defendant") is a public benefit corporation organized and existing under Public Housing Law § 157 (*id.* ¶ 2). On June 25, 2014, Plaintiff was awarded a contract with Defendant in the amount of $14,301,381.00 (the "Contract") for "Exterior Restoration and Roofing Replacement" at two public housing developments in Brooklyn, New York, the Taylor-

[1] Except where otherwise noted, the facts recited here are as set forth in the complaint (the "Complaint") and are accepted as true, as required on a motion to dismiss.

Wythe Houses ("Taylor-Wythe") and Wyckoff Gardens, (*id.* ¶ 3; Ndiangang aff, exhibits 1-3).[2] The work at Taylor Wythe included (a) exterior restoration, roofing replacement and related work, including asbestos abatement work and lead-based paint abatement work, at five tenant-occupied apartment buildings ranging from eight to thirteen stories high and the Community Center building, and work at roof bulkheads (*id.* ¶ 4.). The work at Wycoff Gardens included (b) exterior restoration and related work, including asbestos abatement work, at three twenty-one story tenant-occupied apartment buildings and roof bulkheads (the "Project") (*id.* ¶ 4).

On June 30, 2014, Defendant issued a Notice to Proceed to Plaintiff, according to which Plaintiff's work was to be completed by September 24, 2015 (*id.* ¶ 6). The Contract provided that time was of the essence with respect to the performance and completion of the Contract work (*id.* ¶ 7). In August or September 2015, it was discovered that the facades of three buildings at Wyckoff Gardens were in a more advanced state of deterioration and in disrepair than was previously observed, requiring additional masonry-related work (Ndiangan aff ¶ 4; Singh aff ¶¶ 11-13). Thereafter, the parties entered into two relevant change orders (together, the "Change Orders"), including one dated April 12, 2016, which increased the Contract total by $10,000,000 ("Change Order No. 2", NYSCEF Doc. No. 19) and another dated August 5, 2016, which decreased the contract total by $515,416.98 ("Change Order No. 3," NYSCEF Doc. No. 3). The Project completion date was also extended from September 24, 2015 to December 30, 2016 (complaint ¶ 9).

By virtue of the Contract and the Change Orders, the parties agreed that Plaintiff would be paid "unit prices" for its work on the Project (Ndiangang aff, exhibits 2 § 11, exhibits 5-6).

[2] The agreement between the parties consists of the following documents, collectively referred to here as the Contract: Instructions to Bidders and General Conditions, Specifications, Drawings, and the Form of Proposal/Form of Bid.

Munoz Engineering P.C. ("Munoz"), Construction Manager for the Project, utilized a "Reconciliation Sheet" in order to track change order work on the Project, including the number of "units" completed (Singh aff ¶¶ 22-23). The Reconciliation Sheet was finalized and provided to Defendant on December 7, 2016 (Singh aff ¶ 24).

The Contract provides that Plaintiff is permitted to alter or change the contract work by ordering extra work, omitting or reducing work, and it sets forth in detail how the contract price shall be adjusted by such changes, and delineates the claims process for objecting to changes to the work (*see inter alia*, Ndiangang aff, exhibit 2 at 15, Section 8 – Modifications of Compensation; Changes in the Work; Section 10 – Extra or Omitted Work; at 20, Section 23 – Claims). "Extra Work" is defined as "work required by [Defendant] which in its judgment is in addition to that required by the Contract in its present form" (*id*. § 10).

Plaintiff alleges that, during the course of the Project, it performed unpaid Extra Work and incurred damages as a result of Defendant's delays (the "claims"). On December 23, 2016, Plaintiff sent a letter regarding the purported Extra Work to Jakub Rudkowski, Senior Project Manager for Munoz (complaint ¶ 17; Ndiangan aff in opposition ¶ 27). The letter indicates that it is in reference to "Exterior Restoration & Roofing Replacement, at Taylor Wythe Houses & Wyckoff Gardens, Brooklyn, NY," and states, in relevant part, the following:

> Please find herewith the following list of Pending to be negotiated Change orders and Final Project reconciliation cost proposal as we are getting closure [sic] to project completion and change orders are need [sic] to be negotiated prior to project completion, all these additional items were discussed, notified and communicated immediately after their occurrence or noticing the from our contract document.

(Kao affirmation in opposition, exhibit A). Below this text is a list of eight items designed letters "A" through "H" under the headings "Type of Change Order" and "All the above Unit price/

under run and over run/COs" (*id.*). A total dollar figure is indicated for each item (*id.*). The items and dollar figures listed in the letter are as follows:

A. Change in Unit Price on Under Run Quantities – Amount "Not Included"

B. NYCHA Took 20% Credit On Sidewalk Shed Bridge Instead Of 2% – $156,571

C. Sidewalk Shed Rental – $212,075

D. NYCHA Paid Bid Price On Over Run Quantity Instead Of New Unit Price - $3,436,744

E. Due to Idling Time Equipment Rental Cost @ Wycoff Gardens Building # 1, # 2 and # 3 – $171,837

F. Loss of production due existing Window guards @ Taylor Wythe Building #01 to #05 – $968,610

G. Additional cost of Pipe Scaffold and roofing protection @ Bulkheads, Chimney and Water tank – $1,078,518

H. Loss of money due to Low bid Unit price @ Taylor Wythe bldg #01 to #05 – Amount "Not Included"

(*id.*)

On February 2, 2017 and November 2, 2017, Plaintiff sent additional letters to Defendants titled "Second Verified, Detailed Statement and Notice of Claim" and "Amended Verified Notice of Claim," respectively (Kao affirmation in opposition ¶ 3, exhibit B, C). The February 2, 2017 letter is addressed to Ms. Shola Olatoye, Chair & CEO of Defendant, copying several additional officers and agents of Defendant, and indicates it was mailed via Certified Mail (*id.* exhibit B). The February 2, 2017 letter states that Plaintiff "hereby notifies you pursuant to the terms of the [Contract], and pursuant to the applicable sections of Public Housing Law, that claimant demands from the [Defendant] the sum of Six million-Twenty four thousand-three hundred fifty six and 00/00 $6,024,356)," and contains detailed information regarding the Contract, Plaintiff's work on the Project, and lists several itemized claims that Plaintiff asserts in

connection with the Project (*id.*). The November 2, 2017 letter is addressed to the Defendant, copying the New York City Housing Authority Capital Projects Division – Construction, and attaches an affidavit of service that indicates it was served upon Defendant by in-person service on a receptionist at Defendant's offices (*id.*, exhibit C). The letter contains a list of the items outlined in the December 23, 2016 letter, makes reference to both prior letters, and indicates that Plaintiff will take legal action to recover $6,024,356, "unless the foregoing Claim is duly adjusted and paid during the time provided by law" (*id*.).

Defendant issued two Certificates of Final Acceptance ("CFA") in connection with Plaintiff's work on the Project (Ndiangang aff, exhibits 8-9). The CFA for the Taylor-Wythe portion of the Project has a "Certificate Date" of February 23, 2016, and the Wycoff Gardens CFA has a Certificate Date of November 2, 2016. Defendant represents that it issued each certificate when the Contract work for the relevant portion of the Project was completed and accepted, as represented by the Certificate Date on the corresponding CFA. Both CFAs, however, were executed and dated May 8, 2017, and Plaintiff alleges that it did not receive the CFAs until September 8, 2017. Plaintiff acknowledges that work at Taylor-Wythe was completed earlier than work at Wycoff Gardens and does not dispute the February 2016 time frame, but it does dispute Defendant's representation that work at Wycoff Gardens was completed on November 2, 2016 (Singh aff ¶¶ 37-38). In support of its position, Plaintiff submits a November 21, 2016 email from Munoz to Defendant, copying Plaintiff, that indicates that certain work at Wycoff Gardens was "just completed" and that approvals from the Department of Buildings were needed before sidewalk sheds could be removed from the Project.

On May 1, 2017, Plaintiff executed and delivered to Defendant a "Contractor's Certificate, Release and Closing Statement" (the "Final Release"), whereby Plaintiff agreed to

release Defendant of any and all claims arising from the Project, except for claims identified in paragraph two of the Final Release in the amount of $6,024,356.00 (complaint ¶ 14). Defendant accepted the Final Release and made a final payment to Plaintiff in the amount of $1,277,793.12, but declined to pay any of the claims reserved by Plaintiff in the Final Release.

The following items were designated as reserved in the Final Release:

A. Change in Unit Price on Under Run Quantities - Amount not included

B. Excessive Credit Taken by Defendant for Sidewalk Shed/Bridge - $156,571

C. Unpaid Sidewalk Shed Rental Costs - $212,075

D. Unpaid Overruns on masonry work - $3,436,744

E. Unpaid Equipment Rental Costs - $171,837

F. Increased Labor/Loss of Production due to existing Window Guards - $968,610

G. Additional Costs for Pipe Scaffold and Roof Protection - $1,078,518

Plaintiff then commenced this action to recover these amounts. During the pendency of the motion, Plaintiff withdrew its claims for the items designated as “B” and “C” on the Final Release.

On November 1, 2017, Plaintiff commenced this action by filing a summons with notice, which was served on Plaintiff on February 22, 2018. Defendant filed a demand for complaint on April 13, 2018, and the Complaint was filed on September 14, 2018. The Complaint asserts claims for breach of contract, cardinal change/abandonment of the contract, and quantum meruit, and alleges, generally, that various acts and omissions of Defendant resulted in significant delays to the Project and caused Plaintiff to perform extra work and incur additional costs during the pendency of the Project (complaint, NYSCEF Doc. No. 10). Defendant moves to dismiss the

Complaint pursuant to CPLR 3211 (a)(1) and (7) on the basis of documentary evidence and for failure to state a cause of action. Plaintiff opposes.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation

omitted]). In effect, "the paper's content must be 'essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1) (*Lowenstern v Sherman Sq. Realty Corp*., 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc*., 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta,* 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Mkts, Inc*., 31 NY3d 100, 106 [2008]) may be considered.

Discussion

Defendant argues that all of Plaintiff's causes of action should be dismissed because (1) Plaintiff failed to comply with certain notice provisions set forth in Section 23 of the Contract, (2) the purported "Extra Eork" for which Plaintiff seeks compensation was within the Contract scope of work, and (3) Plaintiff's claims are barred by various release and waiver provisions in the Change Orders, Final Release, and other relevant documents.[3] Defendant also argues that Plaintiff's cause of action for cardinal change should be dismissed because the Contract permitted Defendant to add or delete work to be performed by Plaintiff and Plaintiff agreed to the change in scope of work in the Change Orders. Finally, Defendant asserts that the claim for quantum meruit should be dismissed because the Contract governs the subject matter of the dispute. Plaintiff opposes Defendant's motion and contends the December 23, 2016 letter provided timely notice pursuant to Section 23 of the Contract, that the purported Extra Work was

[3] Defendant's moving papers also argue that Plaintiff's claims are barred by Section 55(a) of the General Conditions of the Contract, but these arguments were later withdrawn.

not within the scope of the Contract, and its claims are not barred by waiver, release, or other contractual provisions.

I. Notice of Claim

As an initial matter, the dispute regarding whether Plaintiff provided timely notice in compliance with the notice provisions set forth in Section 23 of the Contract raises a threshold issue. Section 23 provides, in relevant part, the following:

> **SECTION 23 - CLAIMS**
>
> (a) If the Contractor claims that any instructions of the Authority . . . involve Extra Work entailing extra cost, or claims compensation for any damages sustained by reason of any act or omission of the Authority . . . the Contractor shall, within twenty (20) days after such claim shall have arisen, file with the Authority written notice of intention to make a claim for such extra cost or damages, stating in such notice the nature and amount of the extra cost or damages sustained and the basis of the Claim against the Authority . . .
>
> (b) The filing by the Contractor of a notice of claim and the compliance by the Contractor with the demand, if any, for additional data . . . shall be a condition precedent to the settlement of any claim or to the Contractor's right to resort to any proceeding or action to recover thereon, and failure to do so shall be deemed to be a conclusive and binding determination on the Contractor's part that he/she has no claim against the Authority for compensation for Extra Work or for compensation for damages . . . and shall be deemed a waiver by the Contractor of all claims for additional compensation or for damages.

(Ndiangang affidavit in support, exhibit B at 20).

Plaintiff alleges that its December 23, 2016, February 4, 2017, and November 2, 2017 letters all constitute sufficient notice pursuant to Section 23, and that notice was timely provided because its claims "arose" for the purposes of Section 23 no earlier than December 7, 2016, when the Reconciliation Sheet was finalized. Defendant argues that the December 23, 2016 letter does not constitute a Section 23 notice of claim and, in any event, it was not timely because Plaintiff's claims arose at various times between January 30, 2015 and November 2, 2016 (mem in reply at 23-27), depending on the facts and circumstances of each claim.

It is well established that compliance with notice provisions in public contracts, including those set forth in Section 23 of the Contract, is a condition precedent to suit or recovery (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998], *rearg denied* 92 NY2d 920 [1998]; *Everest Gen. Contrs. v New York City Hous. Auth.*, 99 AD3d 479, 479 [2012] ["[T]imely written notice of [the] intention to make a claim for damages . . . [is] a condition precedent to commencing an action [under the Contract]"). New York courts have addressed Section 23 several times and have consistently held that the notice provisions set forth therein are to be strictly construed and enforced, and failure to comply warrants dismissal of the action (*see Universal Constr. Res., Inc. v New York City Hous. Auth.*, 176 AD3d 642 [1st Dept 2019]; *Intercontinental Construction Contracting, Inc. v. New York City Hous. Auth.*, 173 AD3d 453 [1st Dept 2019]; *Metro. Bridge & Scaffolds Corp. v New York City Hous. Auth.*, 138 AD3d 423 [1st Dept 2016]; *Everest Gen. Contrs.*, 99 AD3d at 479.

The purported notice at issue before this court, the December 23, 2016 letter, does not comply with Section 23 of the Contract. First, the letter is not designated a notice of claim, a defect that the Appellate Division "has found to warrant the dismissal of a contractor's action against the Housing Authority" (*Universal Constr.*, 176 AD3d at 643; *see also Intercontinental Constr. Contracting, Inc. v New York City Hous. Auth.*, 173 AD3d 453, 454 [1st Dept 2019]). The December 23, 2016 letter also does not state Plaintiff's intention to make a claim for extra costs or damages, as explicitly required by the Contract (*see Everest Gen. Contrs.*, 99 AD3d at 480 [Contractor's letter did not comply with Section 23 where it was not designated as a notice of claim, gave no indication of an intent to make a claim, and was sent long before the accrual of plaintiff's claim rather than within 20 days of the date the claim arose]).

Rather than stating an intention to make a claim, the December 23, 2016 letter refers to the list of items set forth therein as "Pending *to be negotiated* Change orders and Final Project reconciliation cost proposal," and indicates that "*change orders are [sic] need to be negotiated* prior to project completion" (NYSCEF Doc. No. 52, emphasis added). This type of letter request for change orders does not constitute a notice of claim under Section 23 (*Hi-Tech Constr. & Mgt. Servs. Inc. v Hous. Auth. of the City of N.Y.*, 125 AD3d 542, 542 [1st Dept 2015] ["Neither plaintiff's letter . . . which stated that plaintiff would consider its claim . . . a 'continuous claim,' without stating how much the claim was for, or delineating itself as a notice of claim, nor plaintiff's various requests for change orders, satisfied the contract"]; *Start Elevator, Inc. v New York City Hous. Auth.*, 106 AD3d 450, 450-451 [1st Dept 2013] [Letter that stated the amount of extra cost but was not designated as a notice of claim and instead requested a change order did not comply with Section 23]). In light of these factors, the December 23, 2016 letter does not satisfy the notice requirements set forth in Section 23. Therefore, Plaintiff did not send Defendant written notice of its claims, for the purposes of the Section 23, until it sent the February 4, 2017 letter, which is designated a notice of claim, is directed to Defendant and several of its officers and managers, states Plaintiff's intention to make a claim, and details the amount and basis of the claims.

It is well settled that a contractor's claim accrues when its damages are ascertainable (*Colonial Surety Company v New York City Hous. Authority*, 182 AD3d 517, 517 [1st Dept 2020], *citing C.S.A. Constr. Corp. v New York City School Constr. Auth.*, 5 NY3d 189, 192 [2005]). "Although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, it has generally been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of

the work performed is submitted" (*C.S.A. Contr.*, 5 NY3d at 192 [2005] [internal quotation marks and citations omitted] [interpreting statutory notice of claim similar to contractual notice of claim at issue]).

Despite Plaintiff's assertions to the contrary, the Reconciliation Sheet was not necessary for Plaintiff to ascertain its damages for the alleged claims. Because the Contract and Change Orders set forth both the unit prices and the number of units to be completed, Plaintiff had sufficient data to calculate its damages for any alleged Extra Work upon substantial completion of said work or when it submitted invoices for its work to Defendant (*see Universal Constr.*, 176 AD3d at 643 [Plaintiff that "was required to maintain weekly payroll records, rented or acquired materials and equipment before it began work, and based its subcontractor costs on pre-negotiated rates" could calculate its damages for extra work when the work was substantially complete]; *Bri-Den Const. Co., Inc. v New York City School Constr. Auth.*, 55AD3d 649, 650 [2d Dept 2008] [Contractor's claims accrued when it submitted the last of numerous detailed invoices pertaining to that work]). Where a contractor asserts several claims related to a single Project, courts look to the facts and circumstances of each claim to determine when damages are ascertainable for that item (*see APS Contractors*, 2020 NY Slip Op 30694[U] at *2 [Sup Ct, NY County 2020]); *Master Painting & Roofing Corp. v New York City Hous. Auth.*, 28 Misc3d 1235 [A] [Sup Ct, NY County 2010]).

Documentary evidence produced by the Defendant — the CFAs issued on February 23, 2016 and November 2, 2016 — indicate that Plaintiff's work on the Project was completed contemporaneously with the issuance of each certificate. Plaintiff acknowledges that work on each portion of the Project was completed at different times and does not dispute that its work on the Taylor-Wythe portion of the Project was completed in February 2016 (Singh aff ¶¶ 37-38).

Therefore, any claims for Extra Work on that portion of the Project accrued no later than February 2016 and the Section 23 notice of claim was untimely.[4]

Plaintiff does dispute the completion date of the Wycoff Gardens portion of the Project, but to no avail. First, the November 21, 2016 email it submits in support of its position only addresses the scaffolding and sidewalk sheds, which only relate to a portion of Plaintiff's claim designated as Item "G" – Additional Costs for Pipe Scaffolding and Roof Protection (Singh aff ¶ 85). Second, Plaintiff's notice of claim would still have been untimely if the accrual was calculated from December 7, 2016 or even December 30, 2016, when the Complaint alleges that Plaintiff completed work on the Project, because Plaintiff did not send a Section 23 notice of claim until February 4, 2017. Moreover, a number of Plaintiff's claims, as detailed in the affidavit of Jaswant Singh, President and Owner of Plaintiff, submitted in opposition to the motion, accrued earlier than the CFA dates or they are facially deficient (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [On a motion to dismiss, "affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action"]).

Item "D" – Unpaid Overruns on Masonry Work

With respect to item "D" in the amount of $3,436,744, Plaintiff's February 4, 2017 Notice of Claim states the following:

> [Plaintiff] received additional Quantities as an over run/change order quantities with [Plaintiff's] contract unit prices and these contract unit prices are very low and we were already losing money with base contract scope quantities. Due to new additional quantities with low unit prices it was hurting [Plaintiff] further. [Plaintiff] requesting [Defendant] to reconsider the change in unit price[.]

[4] This includes Plaintiff's claims designated as Item "F" – Increased Labor/Loss of Production due to existing Window Guards and the (b) portion of the claim designated as Item "G" – Additional Costs for Pipe Scaffolding and Roof Protection (Singh aff ¶¶ 85, 110).

(NYSCEF Doc. No. 53 ¶ 23). To the extent that Plaintiff seeks to dispute the unit prices for the work items associated with item "D", these claims accrued when the parties agreed to the unit prices, i.e., the date on which Change Order No. 2 was executed. Thus, the notice of claim was untimely with respect to this claim.

In opposition to this motion, Plaintiff proffers bases for this claim that are different from the point raised in its aforesaid Notice of Claim. The court will address them, as well. Plaintiff points to six individual work items performed at the Wycoff Gardens Buildings, designated as items (a) through (f) (Singh aff ¶ 44).[5] Plaintiff's points raised in opposition – now on this motion – are as follows.

(a) "MAS 200 - Exterior Wythe Reconstruction: Brick Cavity Wall"

Plaintiff now asserts that it completed but was not paid for this purported Extra Work at Wycoff Gardens (Singh aff ¶ 56). This line item was contemplated in the bid proposal for the Contract at a rate of $74.23 and is included in a Bulletin prepared by Defendant in connection with Change Order No. 2 at a rate of $83.06 (Ndiangang aff, exhibits 3. 5). This claim accrued when the work was completed, and the Section 23 notice of claim was untimely as addressed herein, *supra*.

(b) "MAS 200 - Panel/Crack Repair", (d) "SIL 240 - Sill Replacement, and (e) ACM 115 - AMC Window Sill Sealant

Plaintiff now asserts that it was paid the total dollar amounts listed on the Reconciliation Sheet rather than the total dollar amounts listed on Change Order No. 2 (Singh aff ¶¶ 59-63).[6]

[5] Plaintiff was paid for Item (c) and this is no longer in dispute (*id.* at n. 5).
[6] For example, Plaintiff asserts that it should be paid $2,408,740 for item (b) MAS 200 – Panel/Crack Repair, which is based on a unit price of $83.06 multiplied by an estimated quantity of 29,000 units, but it was actually paid $2,064,611.07 because it completed 24,856.9 units of this item, as tracked on the Reconciliation Sheet (24,856.9 x $83.06 = $2,064,611.07) (NYSCEF Doc. No. 20, Change Order No. 3 at 3; Singh aff, exhibit J at 5).

Plaintiff does not allege that it was not paid for the work it actually completed, only that it should have been paid the dollar amounts set forth in Change Order No. 2. This claim is facially deficient because the Contract sets forth that Plaintiff is to be paid unit prices for the actual units of work performed (Ndiangang aff, exhibit 3, Form of Bid § III[E][10] ["Although the Contract will have a not-to-exceed aggregate price, periodic progress payments will be based, pro-rata, on *actual quantities of work* performed by the Contactor for each Item *at the Unit Prices* in the Work Cost Breakdown as adjusted by the Multiplier"] [*emphasis added*]). Where a contractor agrees to be paid unit prices, it is entitled to be paid the unit prices, even where the quantity of work differs from expectations (*Depot Constr. Corp. v State of New York*, 19 NY2d 109, 113 [1967]. Moreover, to the extent that this claim represents a dispute to the information tracked in the Reconciliation Sheet, such claim arose on December 7, 2016 when the sheet was finalized, and the Section 23 notice of claim was untimely as addressed herein, *supra*.

(f) PRO 110 - Sidewalk Shed Rental"

This item alleges that "there was a mathematical error that is apparent on the face of the Change Order No. 2," specifically that the monthly rental cost set forth in Change Order No. 2 is indicated in the "Description of Change" field as "3444 @ $5 = $12,468.00", but 3444 multiplied by five is actually $17,220. The incorrect calculation of $12,468.00 was then carried over onto the "Unit Price" calculation, resulting in a "Net Amount" of $149,616.00 instead of $206,640.00. Because this discrepancy was ascertainable on the face of Change Order No. 2, the claim accrued on the date that Change Order was signed by the parties (i.e., April 12, 2016 [*see*, NYSCEF Doc. No. 19]). Thus, the February 2017 notice of claim was untimely as discussed hereinabove.

Item "E" – Unpaid Equipment Rental Costs

Plaintiff asserts this claim to recover delay damages attributed to the idling of rental equipment from August 20, 2015 to November 2015. Plaintiff represents that the equipment in question was idling because Defendant discovered that the masonry at Wycoff Gardens was in a "heavily deteriorated condition," requiring evaluation and more work than previously anticipated (Singh aff ¶¶ 74-75). This claim is barred by the "no damages for delay" clause set forth in Section 14 of the General Conditions of the Contract (Ndiangang aff, exhibit 2). Under Section 14, Plaintiff agreed to make no claim against Defendant for "damages for suspension of or delay in the performance of this Contract occasioned by delays or interruptions of the Work" and that "any such claim shall be fully compensated for by an extension of time to complete performance" (*id.*). Exculpatory clauses of this type are enforceable, and Plaintiff was granted an extension of time to complete its work on the Project (*see LoDuca Associates, Inc. v. PMS Const. Management Corp.*, 91 A.D.3d 485, 485 [1st Dept 2012]).

Plaintiff's reliance on Section 15 of the agreement is misplaced. Section 15 only applies in instances where the delay in question was "for the Authority's convenience" (NYSCEF Doc. No. 16 at 16 of 38), but Plaintiff concedes that this delay incurred not for convenience, but because the masonry at Wycoff Gardens was discovered to be in a more heavily deteriorated state than previously thought (Singh aff ¶ 74-75). Furthermore, Plaintiff's damages for this claim were ascertainable at the end of the delay period, and therefore it was obliged to give notice of the claim within twenty days of this date, which Plaintiff does not allege that it did (*see Diontech Consulting, Inc. v New York City Hous. Auth.*, 2009 NY Slip Op 33312 [U] [Sup Ct, NY County 2009] ["[T]o the extent plaintiff claims extra work and damages in connection with the

suspension of [contract] work, the latest possible date for plaintiff's claims to have accrued was on the last date of the suspension"]).

Item "F" – Increased Labor/Loss of Production due to existing Window Guards and Item "G" – Additional Costs for Pipe Scaffolding and Roof Protection

Plaintiff's claim designated item "F" in the amount of $968,610 is for costs associated with removal and reinstallation of a large quantity of metal "security cages" at the Taylor-Wythe Buildings, which it asserts constitutes Extra Work, as defined by the Contract (Singh aff ¶ 110). Plaintiff's claim designed "G" in the amount of $1,078,518 consists of two separate items, (a) the costs of additional masonry work performed by Plaintiff in overrun quantities on the Bulkheads, Water Tanks and Chimneys at Wyckoff Gardens, and (b) the costs of furnishing, installing and maintaining pipe scaffolding and related materials at the Bulkhead, Chimney and Water Tanks located on the roofs of the Taylor-Wythe and Wycoff Gardens Buildings (Singh aff ¶ 85). These claims accrued when the work was completed, and the Section 23 notice of claim was untimely, as addressed above.

II. Cardinal Change and Quantum Meruit

Plaintiff's attempt to exempt its quasi-contract causes of action for cardinal change and quantum meruit from compliance with the notice provisions set forth in Section 23 is unavailing, and its reliance on *Laquila Group, Inc. v Hunt Const. Group, Inc.* (44 Misc3d 1203 [A] [Sup Ct, Kings County 2014]) is misplaced. As explained in a recent decision of the Commercial Division of this court, "the doctrine [of cardinal change] typically serves to delineate whether a change order will be sufficient to govern the unexpected condition: 'Change orders may only change work within the general scope of the contract,' a crucial phrase interpreted to exclude application of the 'changes' clause to 'cardinal' changes beyond the contract's scope" (*Five Star Elec. Corp. v The Trustees of Columbia University,* 2020 N.Y. Slip Op. 31553(U) at * 6 [Sup Ct, NY

County, May 12, 2020], *citing Mikada Group, LLC v T.G. Nickel & Assoc.*, LLC, 2014 WL 7323420 at *17 [SDNY Dec. 19, 2014], *quoting* 1 Bruner & O'Connor Construction Law § 4:5). "Effectively, a claim that seeks relief under the 'cardinal change doctrine' seeks rescission of the contract and relief under a quasi-contract theory, such as *quantum meruit*, on the basis that the change was so drastic that it constituted an abandonment of the original contract; however, the 'number or character of the changes' does not necessarily 'alter or destroy the essential identity of the thing contracted for' (*id., quoting Phoenix Elec. Contr., Inc. v Lehr Const. Corp.*, 219 AD2d 467, 468 [1st Dept 1995] [considering evidence adduced at nonjury trial]). The ultimate inquiry with respect to a claim for cardinal change is "whether the supplemental work ordered so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract, that it constitutes a new undertaking" (*Albert Elia Bldg. Co., Inc. v New York State Urban Dev. Corp.*, 54 AD2d 337, 343 [4th Dept 1976]).

Although cardinal change claims may involve issues of fact that cannot be resolved on a motion to dismiss, compliance with Section 23 is a condition precedent to suit or recovery, regardless of the nature of the claim (*A.H.A. Gen. Constr.*, 92 NY2d at 30-31 [Notice provisions in public contracts are "conditions precedent to suit or recovery," not exculpatory clauses]; *see also Five Star Elec. Corp. v The Tr. of Columbia Univ.*, 2020 N.Y. Slip Op. 31553(U) at * 7 [dismissing cardinal change claim barred by terms of agreement]; *see also Morelli Masons, Inc. v Peter Scalamandre & Sons, Inc.*, 294 AD2d 113, 113 [1st Dept 2002] [affirming dismissal of claim for extra work arising out of delays and other causes under construction contract where subcontractor failed to comply strictly with notice provision of its subcontract]; *Everest Gen. Constr., supra*, 99 AD3d at 479 [affirming dismissal of claims as a result of delay where plaintiff failed to comply with notice provisions of Section 23]).

To permit a plaintiff to replead the same claims in equity where it has failed to satisfy contractual conditions precedent would undermine the notice provision and allow the plaintiff to sidestep contractual provisions to which it agreed to be bound (*see Metro. Bridge & Scaffolds Corp. v New York City*, 138 AD3d 423 [1st Dept 2016] ["To allow the same [contract] claim to be pleaded in quantum meruit would undermine the notice of claim requirement"]). This comports with the general rule that a Plaintiff may not recover in quantum meruit where a contract governs the subject matter (*Centennial El. Indus., Inc. v New York City Hous. Auth.*, 129 AD3d 449, 450 [1st Dept 2015] ["Plaintiff may not recover in quantum merit or unjust enrichment given that the contract governs the subject matter."]). *Laquila* and other case law cited by Plaintiff are inapposite because they did not address instances where the plaintiff failed to comply with conditions precedent to the contract.

Moreover, none of the changes identified by Plaintiff are "cardinal" changes because they were of the same type of work contemplated by the Contract, and the "main purpose" of the contract — exterior restoration and roofing replacement — was not altered (*see Peter Scalamandre & Sons, Inc. v State of New York*, 65 AD3d 774, 776 [3d Dept 2009]; *see also Five Star Elec. Corp. v Plaza Const., LLC*, 2020 WL 4464334 at * 5 [Sup Ct, NY County, July 30, 2020]). Each purported item of Extra Work was a line item that was, in fact, contemplated by the Contract and had a set unit price that Plaintiff agreed to be paid for each unit of work completed. Where the Contract expressly provides for the addition or omission of work within this scheme and sets forth in detail how the contract price shall be adjusted by such changes, these changes cannot be considered "cardinal" (*see, Constanza Constr. Corp. v City of Rochester*, 147 AD2d 929 [4th Dept 1989]; *Depot Constr. Corp. v State of N.Y.*, 23 AD2d 707 [3d Dept 1965]; *see also, Five Star Elec. Corp. v Plaza Const. LLC*, 2020 WL 4464334 at *5 [Sup Ct, NY County,

July 30, 2020] [changes were not cardinal where "Plaintiff was still required to perform the same kind of work"]). Therefore, the claims for cardinal change and quantum meruit are dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed in its entirety.

This constitutes the decision and order of the court.

8/19/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE